BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LESLIE F. NUESSEN, DECEASED		
Claimant	)	
VS.	)	
	)	
SUTHERLANDS	)	
Respondent	)	Docket No. 1,057,760
AND	)	
	)	
LUMBERMEN'S UNDERWRITING ALLIANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the December 7, 2012, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on April 10, 2013.

APPEARANCES

Michael C. Helbert of Emporia, Kansas, appeared for claimant. Mark J. Hoffmeister of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated that if claimant's death was compensable, ALJ Avery correctly awarded $12,500 to each of claimant's adult children, Marc Nuessen and Julie Wilson.

ISSUES

This is a claim for a December 21, 2010, accidental death resulting from head trauma that claimant sustained from a fall at work on December 20, 2010. In the

December 7, 2012, Award, ALJ Avery determined claimant's death arose out of his employment with respondent. The ALJ awarded death benefits to claimant's two adult legal heirs ($12,500 to each for a total of $25,000), funeral expenses not to exceed $5,000, and medical expenses.

Respondent contends claimant had a prior medical history of presyncopal episodes and that claimant's accident occurred when he passed out due to low blood sugar and a personal health condition evidenced by his long history of presyncopal episodes. Respondent submits that where an employee's injury is clearly attributable to a personal condition of the employee and no other factors intervene or operate to cause or contribute to the injury, no award is granted. Respondent maintains:

> It is clear from the evidence that the Claimant passed out and died as a result of his fall onto a concrete floor. The only medical evidence presented as to why the Claimant passed out was that of Dr. Abrams. His opinions are supported by the history of medical records from Dr. Smiley and the medical records taken on the day of the injury. The Claimant's fall and unfortunate death are all as a result of a personal, idiopathic condition. The concrete floor is not a special hazard of employment. Accordingly, the Claimant failed to prove his burden of showing that the injury arose out of and in the course of the Claimant's work and the claim should be denied.[1]

Claimant, through his heirs, contends this claim is compensable. Claimant asserts he experienced orthostatic hypotension when he stood up quickly after being in a squatting position while performing his job duties, and then fainted. Claimant maintains personal conditions respondent points to including diet, low blood sugar and excessive drinking of water are speculation, and lay witnesses denied a preexisting problem with fainting. Claimant also asserts that the law is generally that an injury resulting from the concurrence of some idiopathic condition and some hazard of employment is compensable. Claimant argues the requirement that respondent's employees work from floor level to overhead places increased risks upon the employees. Claimant submits that at a minimum, claimant's injury amounts to a neutral risk and is compensable.

The issue before the Board on this appeal is: Did claimant's fall arise out of his employment with respondent? Specifically,

1. Was claimant's fall an accident arising out of and in the course of his employment with respondent? Specifically, was claimant's fall the result of a personal risk or a neutral risk?

2. If claimant's fall was the result of a personal health risk, was claimant's fall onto a concrete floor an accident arising out of his employment with respondent?

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[1] Respondent's Brief at 13 (filed Jan. 10, 2013).

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

On December 20, 2010, Daryl May, a registered nurse, went to respondent's store in Emporia, Kansas, to shop for Christmas. Claimant, a clerk at the store, whom Mr. May had never previously met, showed Mr. May some tool sets. The items were located in the tool corral on the bottom shelf. Claimant and Mr. May squatted down in a catcher's stance for one to two minutes to look at the tool sets.

Mr. May stood up and walked down the aisle as claimant put away the tool sets. Initially out of the corner of his eye and then at full view, Mr. May observed claimant fall from a standing position. Mr. May testified claimant fell straight down like a cut tree. Claimant made no attempt to break his fall. Mr. May went to claimant's aid and yelled for help. Claimant was not breathing very well and at least one of his arms was contracting towards his body. Mr. May could tell claimant had a head injury. Mr. May testified that prior to the fall, claimant's speech was not slurred and he was responding normally to Mr. May's questions. Mr. May felt there was nothing wrong with claimant before the fall. Mr. May yelled for help, and the police and emergency responders were called.

Claimant was transported by ambulance to Newman Regional Health in Emporia, Kansas. Claimant was awake and spoke to medical personnel. A short time later he was transferred to Stormont-Vail Regional Health Center by helicopter. Claimant died on December 21, 2010, at Stormont-Vail.

Anthony Fuller, who is a firefighter/paramedic, and two EMTs were dispatched to respondent's store to assist claimant. When Mr. Fuller and the EMTs arrived, claimant was not alert, but was aroused with verbal stimuli. They noticed an abrasion to his left elbow and dressed it. Claimant had a lack of muscle control and was placed on a spine board for transport to Newman Regional Health. Oxygen was administered and claimant's blood sugar was checked. Claimant's blood sugar was below 20 milligrams per deciliter. Mr. Fuller testified that 70 to 110 milligrams per deciliter is normal, so dextrose was administered at 12:18 p.m. At 12:20 p.m., claimant's blood sugar level was tested and the test result showed 222 milligrams per deciliter.

Four of respondent's employees who were at the store on December 20, 2010, testified. Todd Swendson, assistant store manager, indicated he heard a fall, left his office and saw claimant lying on his back. Mr. Swendson was not aware of claimant having any physical problems that restricted him from any duties at respondent. Nor had claimant ever complained of being lightheaded to Mr. Swendson. Mr. Swendson conversed with Mr. May to find out what happened. In order to access tools in the tool corral, it is necessary to use a ladder for tools situated above head level and to squat to access tools stored at the lowest level. Mr. Swendson testified that he had heard claimant had been on a diet.

Jason Miller, store manager, was in his office when he was informed by Alicia Goss, the office manager, that claimant had fallen. At some point, Mr. Miller was told by Mr. May what had transpired. Mr. Miller confirmed that in order for a person working in the tool corral to do their job, that person would have to get in positions anywhere from standing to crouching or squatting. He agreed that it would not be unusual to get into a catcher's stance to show a product to a customer. Mr. Miller testified that he learned from a couple of employees, including Nora Peterson, that claimant was trying to lose some weight and trying to get fit.

Alicia Goss was working at the customer service desk when she heard a loud noise and someone yell for help. So she ran to the tool corral. From her position at the customer service desk, she had seen claimant squatting as if in a catcher's stance, showing tools to Mr. May. On occasion, she had stocked merchandise in the tool corral. She testified that in the tool corral, it would be necessary from time to time to squat, kneel, stoop or use a ladder to show merchandise to a customer. Ms. Goss testified that she had gotten wind that claimant was "trying to lose a few pounds, trying to eat healthier."[2]

Nora Peterson worked on the sales floor in the electrical department. Prior to claimant's accident, Ms. Peterson had several discussions with claimant about his diet. Claimant indicated he was on a diet and if he got hungry he would drink water. He was also eating a lot of salads. Ms. Peterson thought claimant had been on the diet several weeks. A few minutes before the accident, claimant showed Ms. Peterson his jeans and how baggy they were from his losing weight. Claimant had never told Ms. Peterson that he had been in ill health. Ms. Peterson confirmed that in the tool corral, merchandise was stocked from above head level to just above the floor.

Coroner Erik K. Mitchell, M.D., performed an autopsy on claimant's body. He opined the head injury from the fall killed claimant. Dr. Mitchell indicated his findings at autopsy were consistent with claimant fainting or passing out, falling and striking his head on concrete. The doctor could not say with certainty what caused claimant to fall. Dr. Mitchell indicated that if a person in perfectly good health squatted for any length of time, then stood up, there is a risk of a temporary reduction of blood flow to the brain and of a fall. That is commonly referred to as orthostatic hypotension. Although the doctor indicated an absolute opinion could not be given as to why claimant fell, orthostatic hypotension was a reasonable possibility. Dr. Mitchell acknowledged that he did not know how long claimant squatted before rising or if claimant was diabetic.

Dr. Mitchell examined the contents of claimant's stomach and found nothing unusual. He estimated that claimant had eaten within at least four hours or so. That period could have been shorter if the liquid in claimant's stomach was primarily coffee and something relatively minor that breaks up quickly. Dr. Mitchell indicated that postmortem

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[2] Goss Depo. at 15.

glucose can often be low simply by reason of postmortem metabolism, so that one can start out with high postmortem glucose, but by the time the assay is drawn, the postmortem glucose may be low. The doctor did not take any glucose readings in this case. Dr. Mitchell testified, "But if we were to speculate that he were [diabetic], then it would be unlikely that he has a low glucose, which tends to cause the unanticipated collapses because he's still got gastrointestinal content."[3]

Respondent employed the services of neurologist Bernard M. Abrams, M.D., who has previously testified in multiple workers compensation claims. He reviewed: (1) claimant's medical records of December 20 and 21, 2010, from Newman Regional Health and Stormont-Vail Regional Health Center; (2) the autopsy report and certificate of death; (3) the Emporia police report; (4) deposition transcripts of Anthony Fuller, Alicia Goss, Daryl May, Jason Miller, Todd Swendson and Nora Peterson; and (5) the medical records of Dr. Scott A. Smiley, claimant's family physician.

It was Dr. Abrams' opinion within a reasonable degree of medical certainty that claimant lost consciousness due to hypoglycemia, something brought on by dieting and consumption of water to assuage hunger which previously had been associated with presyncope in Dr. Smiley's records on several occasions. Dr. Abrams based this opinion on several premises.

First, Dr. Abrams opined that claimant was extremely hypoglycemic at the scene of the fall. Dr. Abrams testified that emergency personnel who initially assisted claimant did a stat blood sugar and found claimant's blood sugar was 20 milligrams per deciliter or below, and immediately began giving claimant glucose. He explained the relevance of a blood sugar level of 20 milligrams per deciliter is that it is consistent with a loss of consciousness. Dr. Abrams testified that when claimant arrived at Newman, one clinical impression of personnel there was that claimant had a hypoglycemic episode and syncope.

Second, Dr. Abrams deduced that claimant was unconscious before he hit the floor, as claimant had no defensive wounds.

Third, claimant had a prior history of syncope or presyncope due to drinking cold liquids or water. Dr. Abrams testified that Dr. Smiley's records indicated claimant had several presyncopal episodes dating back to 1999. In 2008, Dr. Smiley's records indicated claimant had several presyncopal episodes, particularly when he consumed hot or cold liquids. However, Dr. Smiley's October 9, 2007, notes indicated claimant would have some episodes of presyncope when drinking cold liquids, but an episode did not happen every time claimant drank a cold liquid. As recent as October 2010, Dr. Smiley's notes indicated claimant was having trouble catching his breath.

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[3] Mitchell Depo. at 13.

Next, Dr. Abrams theorized that on the date claimant fell, he was dieting. He based this on the testimony of Ms. Peterson. According to Dr. Abrams, Ms. Peterson testified that she was told by claimant that if he got hungry, he would drink water. Dr. Abrams, on cross-examination, acknowledged that he did not know what type of diet claimant was on, nor did he know how long before claimant fell that he last drank water.

On cross-examination, Dr. Abrams was asked extensively about a condition known as orthostatic hypotension and whether claimant could have fallen because of orthostatic hypotension. Dr. Abrams indicated that when a person stands up, gravity causes blood to pool in the legs. That, in turn, decreases blood pressure because there is less blood circulating back to the heart. Cells near the heart and neck arteries counteract that by triggering the heart to beat faster. Orthostatic hypotension occurs when something interrupts the body's natural process of counteracting low blood pressure. Dr. Abrams acknowledged that anyone who gets up from a seated, lying or crouching position is at risk for orthostatic hypotension. However, Dr. Abrams opined that in the majority of individuals of claimant's age group who are well enough to go to work, crouching for two to three minutes will not produce orthostatic hypotension resulting in loss of consciousness. He testified:

> But I'd just like to state my contention, my contention is simply this, it could be summarized in one sentence and that is that any individual who is normal, whether they suffer a *[sic]* orthostatic hypotensive episode from bending over and standing up or crouching and standing up, does not suffer an orthostatic hypotensive episode of the order of magnitude where they fall completely unprotected. That's my vade mecum, my summary statement.[4]

Dr. Abrams also stated:

> I'm not quite sure really what you're asking me, I mean, could he have passed out from orthostatic hypotension, yes. Could he have passed out from hypoglycemia, yes. If he did pass out from orthostatic hypotension is the orthostatic hypotension part of his job because he was required to do something, which doesn't sound like an unusual stress or not, to me that's for the Administrative Law Judge to decide, not for me, I don't think so. I don't think so, I mean, I think that if you have to protect against anybody who crouches for two or three minutes or one or two minutes, then the work force is going to be restricted to those people who could pass an NFL physical, you know, I mean. And I just don't believe that there's any evidence, any more evidence that he had orthostatic hypotension than that he had hypoglycemia and at least we have a number for the hypoglycemia, which you can dispute, but that's a number, you know.[5]

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[4] Abrams Depo. at 34-35.

[5] *Id.* at 39.

Marc Nuessen and Julie Wilson, claimant's adult surviving children, testified that claimant was not married at the time of his death. Claimant had no other surviving children, as claimant's only other child died at age three. Marc Nuessen and Ms. Wilson testified claimant was physically active. Claimant would ride his bike in good weather, golf two times a week using a pull cart and go to the gym several times a week. Both claimant's surviving children testified claimant was not a smoker.

Ms. Wilson testified that claimant had a healthy diet. Claimant rarely drank soda and did not consume much junk food. Claimant did not indicate to Ms. Wilson of being on an extreme diet. Ms. Wilson indicated claimant never mentioned having hypoglycemia.

Marc Nuessen testified that he has been appointed the administrator of claimant's estate. The parties stipulated to Letters of Administration in Lyon County, Kansas, District Court Case No. 11 PR 4. Marc Nuessen indicated claimant never mentioned having blood sugar problems. When asked if his father ever mentioned being on a diet, Marc Nuessen indicated that occasionally around the holidays, claimant said he would like to lose a few pounds, but it was never excessive or extreme. Marc Nuessen testified that claimant would not miss meals.

ALJ Avery found:

> The Court finds that more likely than not claimant's accidental death was the result of an unexplained fall and that in accordance with prior holdings, claimant's accidental [death] arose out of his employment with the respondent. There is no clear indication in the record why claimant collapsed to the floor of his employer's business.
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> Even if the claimant had been determined to have some preexisting condition that caused the fall, the death would still be compensable. Where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed. *Bennett v. Wichita Fence Co.*[,] 16 Kan. App. 2[d] 458 (1992).
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> . . . .
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> The Court finds that even if claimant's death were the result of some unknown personal condition, it concurred with a hazard of employment (concrete floors) and therefore his death arose out of his employment.[6]

[6] ALJ Award at 5-6.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[7] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[8]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

In order to determine if claimant's accident arose out of his employment with respondent, the Board first must determine if claimant's fall was the result of a personal health risk or a neutral risk. In *Meyer*,[11] the Kansas Court of Appeals discussed the three categories of workplace risks. The Court stated:

> Our Supreme Court has established three general categories of workplace risks: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979). The risks in the first category are universally compensable. The risks falling in the second category do not arise out of employment and are not compensable. See *Martin*, 5 Kan.App.2d at 299. Under the third category, the compensability depends on the facts surrounding the injury.

Two physicians testified concerning the cause of claimant's fall. Dr. Mitchell testified the cause of claimant's fall was unknown. Thus, if the Board finds Dr. Mitchell more credible, claimant's fall is the result of a neutral risk and arose out of and in the course of his employment with respondent. Dr. Abrams opined claimant's fall was the result of a personal health condition. If the Board adopts Dr. Abrams' opinion, claimant's accident and resulting death is not compensable.

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[7] K.S.A. 2010 Supp. 44-501(a).

[8] K.S.A. 2010 Supp. 44-508(g).

[9] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[10] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[11] *Meyer v. Nebraska Furniture Mart*, No. 107,424, 2012 WL 4937629 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).

Dr. Abrams' theory that claimant's fall was caused by hypoglycemia, a personal medical condition, is based upon conjecture and facts not in the record. Dr. Abrams bases his theory on the fact that shortly after claimant's fall, his glucose level was extremely low. He then opined from statements of coworkers that claimant was dieting and assuaged his hunger by drinking cold water. Consuming the cold water then caused claimant to have a syncopal episode. Dr. Mitchell indicated claimant had eaten within at least four hours of death. There is no testimony in the record to indicate how long it had been before the fall that claimant had last eaten. Dr. Abrams assumed claimant drank cold water prior to the fall to stave off his hunger from dieting. No witness testified they observed claimant drinking any liquid before the fall, much less cold water. Dr. Abrams admitted there was nothing to indicate claimant had consumed cold water preceding his fall. He also acknowledged claimant could have passed out from orthostatic hypotension or hypoglycemia.

Finally, Dr. Abrams' theory ignores Dr. Smiley's October 9, 2007, notes, which indicated claimant did not have a presyncopal episode every time claimant drank cold liquids.

The Board finds that Dr. Mitchell, who performed an autopsy on claimant, is more credible. Rather than speculate on why claimant fell, Dr. Mitchell opined the cause of claimant's fall was unknown. Dr. Mitchell did testify that orthostatic hypotension was a reasonable explanation for claimant's fall. When asked about several theories as to why claimant fell, Dr. Mitchell explained why the cause of claimant's fall is unknown, and thus the result of a neutral risk: "I mean, you can propose those things, but there's no evidence that allows you to support them."[12]

ALJ Avery concluded that if claimant's fall was the result of a personal health risk, claimant's death was compensable as there was a concurrence of a personal health risk and a hazard of employment. The Board finds this issue is moot as claimant's fall was the result of a neutral risk, not a personal risk.

CONCLUSION

Claimant fell as the result of a neutral risk. Therefore, claimant's personal injury by accident and resulting death arose out of and in the course of his employment with respondent.

[12] Mitchell Depo. at 17.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[13] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the December 7, 2012, Award entered by ALJ Avery. Claimant's attorney filed an attorney fee contract on April 10, 2013. The Board remands this claim to the ALJ to address the approval of the attorney fee contract.

IT IS SO ORDERED.

Dated this ____ day of June, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the opinion of the majority. This claimant had preexisting health problems which appeared to lead to his accident. Claimant was hypoglycemic at the scene of the fall, with a blood sugar at or below 20 milligrams per deciliter. This is a personal condition, not related to claimant's job. Under *Meyer*, the fall as a result of a personal risk is non-compensable. Additionally, the ruling by the ALJ that the existence of a concrete floor alone creates a combination of personal risk with a hazard of employment has been overruled by the Board in the past. The Board has held on more than one occasion that the simple act of working on a concrete floor does not constitute an increased hazard sufficient to make an injury

[13] K.S.A. 2012 Supp. 44-555c(k).

compensable. (*Roberts v. Salina Retailers Association*, No. 1,016,052, 2004 WL 3089877 (Kan. WCAB Nov. 19, 2004).) This accident resulted from a health risk personal to the claimant and respondent is not responsible for the result. The undersigned Board Members would deny benefits to this claimant.

BOARD MEMBER

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
krussell@helbert-allemang.com

Mark J. Hoffmeister, Attorney for Respondent and its Insurance Carrier
mhoffmeister@hdwlawfirm.com

Brad E. Avery, Administrative Law Judge